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No. 92-539 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ICELEAN CLARK, *et al.*,
Petitioners,
vs.
KALIMA JENKINS, *et al.*,
Respondents,
vs.
STATE OF MISSOURI, *et al.*,
Respondents,
and
SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Respondents.

BRIEF OF RESPONDENTS STATE OF MISSOURI, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals properly dismissed the petitioners' appeal as untimely?

2. Whether the Court of Appeals' judgment presents any reviewable issues regarding the merits of the district court's order approving two years of funding for staff salaries as a desegregation expense?

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OPINIONS BELOW

The decision of the Court of Appeals has been reported as *Jenkins v. Missouri,* 967 F.2d 1245 (8th Cir. 1992). The district court's opinions are unreported.

COUNTERSTATEMENT OF THE CASE

This is another petition for writ of certiorari filed by a group of would-be intervenors in the Kansas City school desegregation

case. This case has previously been the subject of an opinion of this Court, *Missouri v. Jenkins,* 495 U.S. 33 (1990). Most recently, this case was the subject of a petition for writ of certiorari filed by the same group of would-be intervenors in *Clark v. Jenkins,* No. 92-69. This Court denied the petition for writ of certiorari filed by the Clark group on October 13, 1992. *Id.,* 61 U.S.L.W. 3284.

In this petition, the Clark group challenges the dismissal of its appeal by the United States Court of Appeals for the Eighth Circuit on the ground that they did not file an effective notice of appeal. Pet. App. A-3. Consequently, the Court of Appeals dismissed the appeal for lack of jurisdiction. Pet. App. A-6. As the United States Court of Appeals for the Eighth Circuit noted, the chronology of events leading up to the appeal was a key issue with regard to the holding. Pet. App. A-3.

As early as its July 25, 1989 order, the district court overseeing this school desegregation case ordered that a salary study be done to compare salaries between the School District of Kansas City, Missouri, (hereinafter "KCMSD") which is a defendant and cross-claimant in this litigation, and other comparable school district staff salaries. See *Jenkins v. Missouri,* No. 77-0420-CV-W-4 (W.D. Mo. July 25, 1989). After this salary study was submitted to the court appointed monitoring committee in this case, the Plaintiffs, the KCMSD, and the American Federation of Teachers Local 691 filed motions, in March and April of 1990, seeking desegregation funding for certain staff salaries in the KCMSD. While these proposals varied to a certain extent in terms of types of staff for which the salary increases were sought, each of the proposals sought significant funding for salaries for KCMSD personnel. The State of Missouri Respondents vigorously contested the proposals filed by the other respondents in this action. A significant amount of discovery was conducted and a well-publicized hearing was held over four days, beginning on June 18, 1990. At that hearing, the State Respondents

contested the salary increase proposals of the other Respondents. However, during the trial, the district court indicated that it favored the salary increase proposals of the AFT, KCMSD and the Jenkins Plaintiffs. *Jenkins v. Missouri*, No. 77-0420-CV-W-4, Tr. June 20, 1990, pgs. 659-61. In order to avoid the possibility of even greater liability and in light of the fiscal impact of the proposals under consideration by the district court, the State agreed to a compromise for a two-year period and the parties proceeded to negotiate a proposed order for the Court.

On July 3, 1990, the district court issued an order scheduling a fairness hearing on the proposed settlement. In this order, the district court indicated that it would receive written objections filed by interested members of the public. The proposed order was published in two local newspapers of wide circulation on July 6, 1990. The newspaper announcements carried the text of the proposed order and gave public notice of the July 17 fairness hearing.

The notice also indicated that the District's share of the proposed settlement would be raised pursuant to an increase in the levy in the District from $4.00 to $4.96 per $100 of assessed valuation. Further details of the plan were also disseminated to the public at a July 3, 1990 press conference held by the parties and a July 12 public hearing held by the KCMSD Board. Representatives of the Clark group attended the July 12 public hearing and addressed the KCMSD Board at that time.

Also on July 12, representatives of the Clark group filed a pleading in the district court indicating their opposition to the settlement proposed by the parties, particularly the tax increase aspect. The Clark group did not, at that time, seek to intervene. Two representatives of the Clark group addressed the Court at the July 17 hearing held to assess the fairness of the proposed settlement of the parties. The district court issued its final order approving the parties' settlement on July 23, 1990. Pet. App. A-25. That order set forth the obligations of the parties during the

course of the two-year settlement, authorized the KCMSD to raise its levy to $4.96 per $100 of assessed valuation, and enjoined enforcement of any laws of the State of Missouri "that would prevent the Board of Directors of the Kansas City, Missouri School District from increasing its tax levy rate to that level." Pet. App. A-29. On August 20, 1990, the KCMSD Board formally approved the tax increase that the district court authorized in the July 23, 1990 order. On August 22 the Clark group, still never having attempted to intervene in the district court, filed what it referred to as a "protective" notice of appeal. It was not until August 28, 1990 that the Clark group actually filed its motion to intervene to seek appellate review. After the filing of the motion to intervene, the AFT, the KCMSD, and the Jenkins Plaintiffs moved to dismiss the protective appeal filed by the Clark group on the ground that there was a lack of jurisdiction.

Thereafter, the district court and the appellate court issued rulings at almost the same time. On October 23, 1990, the district court granted the Clark group's motion to intervene, *see, generally,* Appendix F to the Petition, and on October 26, 1990, the Court of Appeals dismissed the Clark group's appeal for lack of jurisdiction because they were not parties to the *Jenkins* case. Pet. App. A-3. The Clark group then sought rehearing by the Court of Appeals of its October 26, 1990 dismissal order, basing its request on the October 23 ruling by the district court. The Clark group filed a second notice of appeal in the district court on November 23, 1990, approximately four months after the July 23, 1990 district court order which the Clark group designated as the subject they hoped to appeal. Pet. App. A-3 through A-4. The Court of Appeals permitted briefing and argument on the rehearing motion. The State joined the other respondents in arguing that the Court of Appeals did lack jurisdiction. On June 30, 1992, the Court of Appeals issued its opinion on the request for rehearing holding that its "initial assessment of the matter was correct — that no effective notice of appeal ha[d] been filed to confer jurisdiction on the court". Pet. App. A-4. The Court of

Appeals held that because the Clark group were non-parties, their August 22, 1990 notice of appeal was ineffective to confer jurisdiction. Pet. App. A-4. The Court of Appeals also held that "[t]he second notice of appeal [filed November 23, 1990] was filed grossly out of time, with no attempt made to obtain any extension of the deadline for noticing the appeal. See Fed. R. App. P. 4(a)(4)," Pet. App. A-5. The Court of Appeals agreed that the Clark group "had clear notice as early as July 3 that all the parties to the litigation had agreed to the tax hike." Pet. App. A-5. The Court of Appeals further indicated that the Clark group's failure to move properly for intervention and failure to ask either for an expedited decision on the intervention motion or for an extension of time to appeal defeated their arguments. Pet. App. A-6. The Court of Appeals also indicated "as an epilogue," without reaching the merits, that no showing was made that there was either an abuse of discretion or error of law in approving the settlement. Pet. App. A-6. This petition for a writ of certiorari followed.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS PROPERLY DISMISSED THE CLARK GROUP'S APPEAL FOR LACK OF JURISDICTION.

On this issue, the State Respondents generally agree with the opposition to the petition for writ of certiorari filed by the KCMSD, Jenkins Plaintiffs, and AFT. The State agrees that the Clark group's failure to take the simple step of moving promptly for intervention when it first became clear that some pecuniary interests of theirs were at stake defeats their ability to argue that the Court of Appeals has placed them in some sort of a "procedural box." Pet. App. A-5.

Therefore, the Court of Appeals quite properly ruled that the appeal should have been dismissed for lack of jurisdiction.

II. THE ISSUE OF THE PROPRIETY OF THE DISTRICT COURT'S SALARY ORDER IS NOT PROPERLY BEFORE THIS COURT.

The Petitioners make a most significant admission at Pet. 18, fn. 10, where they admit "[t]he Court of Appeals did not reach the merits due to the 'jurisdictional defect.' " Pet. App. A-6. By the Petitioners own admission then, the merits are not properly before the Court. The Court of Appeals' judgment therefore simply does not raise any issue as to whether the district court's order, approving two years of funding for staff salaries, was proper according to *Missouri v. Jenkins*.

While the Court of Appeals did make a statement on the tax issue, it was phrased as a hypothetical and as an "epilogue." Pet. App. A-6. This statement is at best dictum and should not be considered by this Court. As a result, this Court should decline the Petitioners' invitation to rule on any of their proposed principles regarding future implementation of this Court's opinion in *Missouri v. Jenkins*.

The State Respondents also note here that, once again, as they did in their petition for a writ of certiorari in *Clark v. Jenkins*, No. 92-69, the Petitioners frequently cite to the concurring opinion in *Missouri v. Jenkins*. See, e.g., Pet. 18-20. As the State Respondents pointed out in their brief in opposition to the petition for writ of certiorari in No. 92-69, while the State Respondents might agree with much of what is said in the concurring opinion in *Missouri v. Jenkins*, particularly on the issues relating to the overall desegregation remedy, and argued against the holding in *Missouri v. Jenkins*, the views of the concurring opinion did not command a majority of the Court.

Further, this Court, in *Missouri v. Jenkins*, 495 U.S. at 52, affirmed a procedure approved by the Court of Appeals by which the district court would authorize the KCMSD to submit a levy to the State tax collection authorities, establish a reasonable maximum, and enjoin the operation of any state laws that would limit or reduce the levy below the amount set by the KCMSD. The key distinction that the majority of this Court recognized in *Missouri v. Jenkins* was that it would be the KCMSD which itself set the levy. *Missouri v. Jenkins*, 495 U.S. at 51. The levy in question here was adopted by the KCMSD Board in accordance with the procedures approved in *Missouri v. Jenkins*, and that should close the matter. The procedure did respect "the integrity and function of local government institutions," Pet. 19, and the role of citizen input in these institutions, *id.*, as it was the KCMSD Board, the representatives of KCMSD taxpayers, who set the levy. As a result, this Court should decline the Petitioners' invitation to enunciate any specific principles regarding future operation of this Court's holding in *Missouri v. Jenkins*.

While the merits are not properly before this Court, the State submits for the record that it initially opposed and continues to oppose desegregation funding for general salary increases for KCMSD personnel. Its agreement to such funding for two years to avoid the possibility of substantially greater liability clearly is

not an agreement to such funding after the end of the period. This matter was litigated anew in 1992, and the State's appeal of the district court's 1992 general salary funding order is pending before the Court of Appeals.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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